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IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
Petitioners,

v.

LARKETTA RANDOLPH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN ARBITRATION ASSOCIATION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE ELEVENTH CIRCUIT GAVE INSUFFICIENT WEIGHT TO THE NATIONAL POLICY FAVORING THE ENFORCEMENT OF ARBITRAL AGREEMENTS	7
A. Agreements To Arbitrate Statutory Claims Fall Within The National Policy Favoring Arbitration	7
B. There Is No Reason To Depart From The National Policy Favoring Arbitration When Disputes Involve Small Claims	8
II. THE ELEVENTH CIRCUIT CORRECTLY IDENTIFIED REASONS FOR CONCERN ABOUT THE ARBITRATION CLAUSE BEFORE THE COURT	11
A. Most Of The Shortcomings Of The Arbitration Clause Do Not Affect Its Enforceability	11
B. The Concerns Expressed By The Eleventh Circuit Go To The Purposes Of The Statutes That Create The Cause Of Action	15

TABLE OF CONTENTS—Continued

Page

III. THE ELEVENTH CIRCUIT SHOULD HAVE TREATED THE SILENCE OF THE ARBITRATION CLAUSE ON COSTS AS AN AMBIGUITY TO BE CONSTRUED SO AS TO PRESERVE THE ENFORCEABILITY OF THE AGREEMENT TO ARBITRATE 17

CONCLUSION 21

APPENDICES

A. A Due Process Protocol for the Mediation and Arbitration of Consumer Disputes 1a

B. AAA Arbitration Rules for the Resolution of Consumer-Related Disputes 12a

TABLE OF AUTHORITIES

CASES Page

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 5, 14
Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997) 19, 20
Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) 7
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ..... *passim*
Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) 11, 14
Keymer v. Management Recruiters International, Inc., 169 F.3d 501 (8th Cir. 1999) 14
Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 18, 20
McWilliams v. Logicon, Inc., 1997 U.S. Dist. LEXIS 9822 (D. Kan. June 3, 1997) 19
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) ..... *passim*
Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983) 7, 18
Paladino v. Arnet Computer Technologies, Inc, 134 F.3d 1054 (11th Cir. 1998) 20
Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967) 5
Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 8, 9, 19
Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 5
Schulze and Burch Biscuit Co. v. Tree Top, Inc., 831 F.2d 709 (7th Cir. 1987) 12
Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 5, 8

TABLE OF AUTHORITIES—Continued

Page

Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F.3d 28 (3d Cir. 1995) 17
Southland Corp. v. Keating, 465 U.S. 1 (1984) 7
UBC Southern Council of Industrial Workers v. Bruce Hardwood Floors, 522 U.S. 928 (1997) 5
Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989) 7
Wilko v. Swan, 346 U.S. 427 (1953) 9
Williams v. Public Finance Corp., 598 F.2d 349 (5th Cir. 1979) 17

STATUTES

Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*
9 U.S.C. § 1 5
9 U.S.C. § 2 ..... *passim*
9 U.S.C. § 5 12
Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*
15 U.S.C. § 1601 17
15 U.S.C. § 1640(a) 18
Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*
15 U.S.C. § 1691-1691f 17, 18
28 U.S.C. § 1914(a) 16

MISCELLANEOUS

Restatement (Second) of Contracts (1981) 20
Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. Rev. 1344 (1997) 13, 14

TABLE OF AUTHORITIES—Continued

Page

Carol Haas, THE CONSUMER REPORTS LAW BOOK (1994) 12

J. Clark Kelso & Thomas J. Stipanowich, *Protecting Consumers in Arbitration*, Dispute Resolution Magazine (Fall 1998) 9, 13

Lewis Maltby, *Employment Arbitration—Is it really second class justice?*, Dispute Resolution Magazine (Fall 1999) 15

Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute Mandatory Arbitration Outlived Its Welcome?*, 40 Ariz. L. Rev. 1069 (1998) 13

Jean R. Sternlight, *Drafting A "Bulletproof" Consumer Arbitration Agreement: Is It Possible?*, in ARBITRATION OF FINANCIAL SERVICES DISPUTES (PLI 1999) 13

Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637 (Fall 1996) 13

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BRIEF AMICUS CURIAE OF THE AMERICAN ARBITRATION ASSOCIATION

This brief is respectfully submitted by *amicus curiae* the American Arbitration Association ("AAA"), not in support of either party, but to urge reversal of the decision below on the second question presented. *Amicus curiae* AAA takes no position on the first question presented. Both Petitioners and Respondent have consented to the filing of this brief.[1]

[1] As required by Rule 37.6, *amicus curiae* AAA states that this brief was authored on its behalf by the counsel identified on the cover and the signature page, and that no one other than the AAA and its counsel made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

Amicus curiae AAA is a not-for-profit, public service organization, which offers a broad range of dispute resolution services through more than 35 offices in cities throughout the United States and cooperative agreements with arbitral institutions in 39 countries around the world. While such services include providing for mediation and other forms of alternative dispute resolution, the service most in demand from the AAA is the administration of arbitration proceedings. In addition, the AAA educates the public and potential users about various forms of dispute resolution and trains neutrals to act as arbitrators and mediators.[2]

The AAA is the largest provider of dispute resolution services in the world. From the time it was founded in 1926, the year after the enactment of the Federal Arbitration Act, through the end of 1999, the AAA has administered 1,693,431 cases, most of them arbitrations. Of those cases, 448,723 were filed in the last five years alone. These arbitrations ranged from major commercial disputes involving millions of dollars to uninsured motorist claims administered under state "no-fault" laws involving claims of a few hundred dollars. The AAA's experience in administering arbitration covers domestic and international claims, disputes arising out of collective bargaining agreements and private employment-related matters, disputes arising in insurance, construction, and other industries with specialized arbitration rules, and thousands of claims by individuals administered by the AAA's mass claims center. It also includes the administration of many disputes involving claims for less than $10,000 brought by individuals and businesses alike.

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[2] The AAA also promotes ethical standards for dispute resolution. The AAA was instrumental in establishing the Code of Ethics for Arbitrators in Commercial Disputes (with the American Bar Association) in 1977, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes in 1985, and the Model Standards of Conduct for Mediators in 1995.

Because the AAA is so heavily involved in the administration of arbitration as well as in education and training, it has a substantial interest in the Court's resolution of the second question presented by the Petition: Whether an arbitration provision that is silent on how the costs of arbitration are to be paid is unenforceable, in spite of the mandate of the Federal Arbitration Act, because a plaintiff asserting claims under other federal statutes designed to protect borrowers might be required to bear those costs.

The issue now before the Court is not new to the AAA. In 1997, in response to the increasing popularity of arbitration as a means of resolving disputes between businesses and consumers, the AAA convened a National Consumer Disputes Advisory Committee to examine concerns that had been expressed about the arbitration of such disputes and to devise guidelines for handling them that would be acceptable to consumer advocates as well as to businesses that deal with large numbers of consumers.[3] The Advisory Committee included persons affiliated with consumer groups, such as Consumers Union and the American Association of Retired Persons, state government consumer-protection professionals, representatives of businesses that deal directly with consumers, academics, and dispute resolution professionals. The Advisory Committee's mission was:

> "To bring together a broad, diverse, representative national advisory committee to advise the American Arbitration Association in the development of standards and procedures for the equitable resolution of consumer disputes." (App. A, *infra,* 8a.)

The result of the work of the Advisory Committee was the publication on April 17, 1998 of *A Due Process Protocol for the*

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[3] We use the term "consumer" in this brief to refer to natural persons and not to business entities that may play the role of consumer in certain of their transactions.

Mediation and Arbitration of Consumer Disputes (the "Consumer Due Process Protocol," a copy of which is appended to this brief as Appendix A). The Protocol stresses the importance of a fundamentally fair process, access to information, independence and impartiality of both the arbitrator and the administering organization, availability of a full range of remedies, a reasonable location for the hearing, and reasonable time limits. Most relevant to the case before the Court, the Protocol's Principle 6 addresses the question of cost, and states:

> "**Reasonable Cost**. Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay. In some cases, this may require the Provider to subsidize the process." (Principle 6, App. A, *infra,* 3a.)

The Protocol also stated that "Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction." (Principle 5, App. A, *infra,* 3a.)

Subsequently, the AAA adopted a set of arbitration rules specifically tailored to consumer disputes and the principles of the Consumer Due Process Protocol, which were issued on July 1, 1999 and amended on April 1, 2000 as the AAA's *Arbitration Rules for the Resolution of Consumer-Related Disputes* (the "Consumer Arbitration Rules," a copy of which is appended to this brief as Appendix B). The AAA has decided, as a matter of internal policy, that all consumer disputes to be administered by the AAA involving claims for less than $10,000 will be processed under the Consumer Arbitration Rules, regardless of the rules, terms and conditions reflected in a pre-dispute clause.

The AAA's interest in the Court's resolution of the second question presented is thus informed by substantial consideration of and experience with the arbitration of consumer claims and of

claims under statutes designed to protect the rights of consumers. The AAA hopes that the views presented on the basis of that consideration and experience will be of assistance to the Court. The AAA has previously filed amicus curiae briefs with the Court in: *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); and *UBC Southern Council of Industrial Workers v. Bruce Hardwood Floors*, 522 U.S. 928 (1997).

SUMMARY OF ARGUMENT

The decision of the Eleventh Circuit appears to assume that arbitration is somehow second class justice, or at least that it imposes substantially greater hardships on litigants than those they face when they pursue litigation in a judicial forum. It is the position and experience of the AAA, however, that justice is not diminished in properly conducted arbitration proceedings. Rather, arbitration can enhance the fair and expeditious resolution of disputes.

The Court has emphasized for nearly twenty years that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (2000), declares a national policy favoring the arbitration of disputes. Consistent with this policy, the Court has enforced agreements to arbitrate a wide variety of claims, including statutory claims involving individuals. By arbitrating such claims, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.*, 473 U.S. at 628. While the Eleventh Circuit recognized the "strong federal policy favoring arbitration," (Pet. App. 15a), it nevertheless declined to enforce the arbitration clause before it out of concern that Respondent

would be unable effectively to vindicate her statutory rights under that clause. (Pet. App. 15a-18a.) The court's concern was well founded, but its solution was not.

The Eleventh Circuit's concern centered on the silence of the arbitration clause on the subject of how the costs of arbitration were to be paid. The court concluded that the consumer's "ability to vindicate her statutory rights" could "be undone by steep filing fees, steep arbitrators' fees or other high costs of arbitration." (Pet. App. 18a.) High filing and arbitrator fees can certainly present a problem in cases involving relatively small claims. That is why the AAA's Consumer Arbitration Rules require no filing fee from the consumer and limit the consumer's share of the arbitrator's fees to $125. But the Eleventh Circuit's concerns must be considered in the light of the mandate of the Federal Arbitration Act that an agreement to arbitrate must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Eleventh Circuit was not required to invalidate the arbitration clause in order to protect Respondent's ability to vindicate her statutory rights.

The preferable course, in view of the federal policy favoring arbitration, would have been for the Eleventh Circuit to apply the rule of contract law that a construction that makes an agreement unlawful should be avoided whenever possible in favor of one that makes it lawful. Following that rule, the Eleventh Circuit should have treated the clause's silence as to costs as an ambiguity. It could then have resolved that ambiguity to allow Respondent to vindicate her statutory rights through arbitration, by placing the burden of paying some or all of the arbitrator's fees and costs on Petitioners. That construction would have given the agreement to arbitrate the deference required by the Federal Arbitration Act.

ARGUMENT

I. THE ELEVENTH CIRCUIT GAVE INSUFFICIENT WEIGHT TO THE NATIONAL POLICY FAVORING THE ENFORCEMENT OF ARBITRAL AGREEMENTS

Congress enacted the Federal Arbitration Act in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). *See also Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Mitsubishi Motors Corp.*, 473 U.S. at 625; *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

The Federal Arbitration Act "declared a national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The core expression of this policy is Section 2 of the Act, its "primary substantive provision." *Gilmer*, 500 U.S. at 24. That section provides that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The decision of the Eleventh Circuit not to enforce the arbitration clause at issue here gave insufficient weight both to that national policy and to the mandate of Section 2 of the Federal Arbitration Act.

A. Agreements To Arbitrate Statutory Claims Fall Within The National Policy Favoring Arbitration

The federal policy favoring arbitration is now clearly understood to apply to agreements to arbitrate statutory claims. *See, e.g., Gilmer*, 500 U.S. at 26; *Mitsubishi Motors*, 473 U.S. at

627. Pursuant to that policy, the Court has enforced agreements to arbitrate many types of claims by individuals, including claims arising under the federal securities laws, *Shearson/American Express Inc. v. McMahon,* 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express Inc.,* 490 U.S. 477 (1989), the Racketeering Influenced and Corrupt Organizations (RICO) Act, *McMahon,* 482 U.S. at 220, and the Age Discrimination in Employment Act. *Gilmer,* 500 U.S. at 20. To be sure, Congress may choose to write a statute that creates a cause of action that must be heard in court, but the Court has placed the burden on the party opposing arbitration to show that Congress intended to preclude waiver of the judicial forum. *See Gilmer,* 500 U.S. at 26; *McMahon,* 482 U.S. at 227.

The Court has emphasized that arbitration is simply a procedural option that does not take away the substantive rights of the parties under a statute:

> "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration." *Mitsubishi Motors,* 473 U.S. at 628.

Accord Gilmer, 500 U.S. at 26.

B. There Is No Reason To Depart From The National Policy Favoring Arbitration When Disputes Involve Small Claims

The federal policy favoring arbitration has had the effect of encouraging the use of arbitration. The annual case load figures of the AAA for the last five years reflect the increasing acceptance and use of arbitration and other alternative means of dispute resolution:

1999	62,423
1999	72,200
1999	78,769
1999	95,143
1999	140,188

These figures bear witness to a dramatic surge in the popularity of arbitration as a means of resolving disputes in the United States. Pre-dispute arbitration clauses are now included in tens of thousands of contracts of all kinds. No single factor appears to the AAA to account for this trend, but some of the elements contributing to the popularity of arbitration that the AAA has identified are:

1. The consistency of U.S. courts in enforcing the national policy favoring arbitration, especially since the series of decisions (culminating in *Rodriguez de Quijas,* 490 U.S. at 484) overruling *Wilko v. Swan,* 346 U.S. 427 (1953), which has given the process increased predictability and reliability;[4]

2. The sheer number of arbitrations, which has given large numbers of users first-hand experience of the benefits of a process that is generally faster and less expensive than litigation, before an unbiased decision maker that they help to select;

3. The increasing criminal caseload of the federal courts, resulting from legislative additions to their jurisdiction, which has made resolving civil disputes in those courts a more time-consuming process;

4. The increase in the number of trained and experienced arbitrators available, which is in part the result of the

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[4] *See* J. Clark Kelso & Thomas J. Stipanowich, *Protecting Consumers in Arbitration*, Dispute Resolution Magazine at 11 (Fall 1998) ("Among private conflict resolution mechanisms, binding arbitration enjoys preeminent status as a result of robust judicial encouragement.").

large number of disputes that have gone to arbitration, and in part the result of the increased emphasis on professional training for arbitrators, which is required by the AAA; and

5. The globalization of commercial transactions, which has increased the demand for a neutral forum for resolving international disputes.

Nor is the demand for arbitration limited to parties involved in major commercial transactions and collective bargaining agreements. Over the years, many of the cases administered by the AAA have involved relatively small claims. Historically, the AAA has not kept data that would distinguish business claims from individual claims. But the records of the AAA show that 2,032 claims for amounts under $10,000 were filed in 1998, and 1,937 claims under $10,000 were filed in 1999. In addition, of the total of 140,188 arbitrations administered by the AAA in 1999, 51,622 involved claims arising out of automobile collisions under state "no-fault" statutes, which were conducted pursuant to procedures similar to those recommended by the Consumer Due Process Protocol. Almost 50,000 of the remaining cases in the AAA's 1999 caseload represent the AAA's involvement in a process mandated by the negotiated settlement of a nationwide class action against a major insurance carrier. Again, many of these cases involved relatively small individual claims.

The AAA would not have been entrusted with the administration of 100,000 claims of individual citizens if those involved—the court overseeing the class action settlement and the state insurance officials responsible for administration of no-fault laws—had not had confidence that arbitration, at least as administered by the AAA with safeguards for a fair process, would provide an appropriate procedure for resolving such claims.

II. THE ELEVENTH CIRCUIT CORRECTLY IDENTIFIED REASONS FOR CONCERN ABOUT THE ARBITRATION CLAUSE BEFORE THE COURT

A. Most Of The Shortcomings Of The Arbitration Clause Do Not Affect Its Enforceability

Agreements to arbitrate are to be enforced, whether they were entered into before or after the dispute, absent circumstances, such as fraud, duress, or unconscionability, that would result in the revocation of any contract.[5] *Mitsubishi Motors,* 473 U.S. at 627; *Gilmer,* 500 U.S. at 33. And courts have not been reluctant to police arbitration agreements under that standard. *See, e.g., Hooters of America, Inc. v. Phillips,* 173 F.3d 933, 938 (4th Cir. 1999) (rescinding arbitration agreement where employer "promulgat[ed] rules so egregiously unfair as to constitute a complete default of its contractual obligation"). No such circumstances are alleged here.

This is not to say that some concern about the arbitration agreement at issue in this case is not well placed.[6] For example,

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[5] The Court has stated that claims "of unequal bargaining power [are] best left for resolution in specific cases." *Gilmer,* 500 U.S. at 33.

[6] The clause reads, in pertinent part: "ARBITRATION: All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s). This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR

the clause fails to specify the rules to be applied, the place of arbitration, or (failing designation of a set of rules that would do so) how the expenses of the arbitration are to be paid. It also allows the "Assignee" to select the arbitrator, albeit with the consent of the "Buyer." (Pet. App. 3a.) But these are all deficiencies that may be supplied by subsequent agreement of the parties or, in the absence of such agreement, by the arbitrator once appointed or by a supervising court.[7] *See Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 711, 716 (7th Cir. 1987) (holding that arbitration provision which stated only that "disputes under this transaction shall be arbitrated" was not too vague to be enforced, because the court was able to supply "such implementing details as who the arbitrators would be, where arbitration would take place, and what procedures would govern").

Some consumer advocates would also criticize the arbitration clause before the Court on the grounds that it is a pre-dispute clause contained in a consumer contract.[8] Putting aside the

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PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes will be subject to binding arbitration in accord with this Contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Contract ... [including] money damages, declaratory relief, and injunctive relief." (Pet. App. 3a.)

[7] Any unfairness in the arbitrator selection provision may be cured by a court, because the clause gives the consumer the right to block the Assignee's selection, and Section 5 of the Federal Arbitration Act would then allow either party to ask a court to appoint the arbitrator. 9 U.S.C. § 5 (2000).

[8] Consumer advocates do not uniformly share this view. *See, e.g.*, Carol Haas, THE CONSUMER REPORTS LAW BOOK at 304 (1994) (recommending that consumers "insist on inserting a future-dispute arbitration clause" in contracts, using the standard AAA clause as an example, because such a clause may enable them "to avoid the high costs of litigation to resolve a contract dispute").

cases entrusted to the AAA by courts or state agencies, the AAA estimates that 90 to 95% of the arbitrations brought to the AAA are submitted to arbitration pursuant to clauses in agreements (most of which are *not* with consumers) entered into before the dispute arises. This is hardly surprising, because arbitration is a creature of agreement. And the AAA can state with assurance based on many years of experience that agreement on any subject is very difficult for parties to reach after a dispute has arisen.

The National Consumer Disputes Advisory Committee, which prepared the Consumer Due Process Protocol, was divided on the question of whether pre-dispute agreements to arbitrate were suitable for transactions between individuals and businesses.[9] Some commentators feel strongly that such agreements are not appropriate, on the basis of such concerns as the reasonable expectations of consumers and relative bargaining power.[10] Others believe that pre-dispute clauses offer "the promise of a less expensive, more expeditious, less draining and divisive process, and yet still effective remedy."[11] While appreciating the sincerity of the policy concerns expressed on both sides of the question, the AAA submits that the Federal Arbitra-

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[9] Five principles (Principles 11-15, App. A, *infra*, 4a-6a) were nevertheless included in the Consumer Due Process Protocol "specially to protect consumers in the context of binding arbitration clauses." Kelso & Stipanowich, *supra*, at 12.

[10] *E.g.*, Jean R. Sternlight, *Drafting A "Bulletproof" Consumer Arbitration Agreement: Is It Possible?*, in ARBITRATION OF FINANCIAL SERVICES DISPUTES (PLI 1999); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute Mandatory Arbitration Outlived Its Welcome?* 40 Ariz. L. Rev. 1069 (1998); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637 (Fall 1996).

[11] Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. Rev. 1344, 1349 (1997).

tion Act requires arbitration clauses whether pre- or post-dispute, to be judged and enforced by the same standards as limitations of warranty, terms of payment, or any other contractual provision. *See, e.g., Allied-Bruce Terminix Cos.*, 513 U.S. 265, 281 (1995) (noting that the FAA makes unlawful any attempt by a state to "place arbitration clauses on an unequal 'footing'" in context of a case involving a pre-dispute arbitration clause in a consumer contract to provide termite protection); *Hooters*, 173 F.3d at 937 ("Predispute agreements to arbitrate Title VII claims are thus valid and enforceable."); *Keymer v. Management Recruiters Int'l, Inc.*, 169 F.3d 501, 504 (8th Cir. 1999) (stating that "we examine arbitration agreements in the same light as any other contractual agreement").

In supporting enforcement of pre-dispute arbitration clauses, subject to appropriate procedural safeguards, the AAA is influenced by the success of another protocol that was drafted under its auspices following the Court's decision in *Gilmer*. The Due Process Protocol for Statutory Disputes Arising out of the Employment Relationship was adopted in May 1995 on the recommendation of a group composed of employment attorneys, representatives of labor and management, and dispute resolution professionals.[12] The widespread adoption of programs conforming to the safeguards established by that Protocol has made available to millions of workers a range of dispute resolution options—from informal processes such as peer review, through mediation, to binding arbitration—that offer "systematic advantages over lawsuits for both workers and their employers." Estreicher, *supra*, at 1351. Indeed, a recent article by the former Director of the ACLU's National Task Force on Civil Liberties in the Workplace examined the results of AAA employment arbitration decisions for the period 1993-1995, just prior to the adoption of the Employment Due Process Protocol, and con-

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[12] The text of the Employment Protocol may be found on the AAA's website, www.adr.org, under Focus Areas - Employment.

cluded that "far more employees win in arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court." Lewis Maltby, *Employment Arbitration—Is it really second class justice?*, Dispute Resolution Magazine at 24 (Fall 1999).

B. The Concerns Expressed By The Eleventh Circuit Go To The Purposes Of The Statutes That Create The Cause Of Action

While noting some of the deficiencies just described, the Eleventh Circuit focused on shortcomings in the arbitration clause that seemed to it to implicate the compatibility of that clause with the purposes of the statutes under which Respondent's claims were brought. The Eleventh Circuit singled out one concern, the clause's silence on who is to pay the costs of arbitration, as so inconsistent with the purposes of those statutes that it justified a refusal to enforce the arbitration clause:

> "* * * the arbitration clause in this case is unenforceable, because it fails to provide the minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." (Pet. App. 18a.)

The Eleventh Circuit contrasted the clause before it to "the rules of the American Arbitration Association, which provide at least some guidelines concerning filing fees and arbitration costs." (Pet. App. 17a.) As the Eleventh Circuit recognized, however, the arbitration clause "says *nothing* about the payment of filing fees or other apportionment of the costs of arbitration." (Pet. App. 17a) (emphasis added). Nor does the clause contain any provision with respect to financial hardship.

High filing and arbitrator fees present a genuine reason for concern if consumers are required to pay them. With that concern in mind, the AAA's Consumer Arbitration Rules require no

filing fee; a claimant is asked to pay only $125 as the claimant's share of the fees of the arbitrator, with all other fees and costs paid by the business party.[13] (App. B, *infra*, 21a.) In larger cases, such as those administered by the AAA under its Commercial Arbitration Rules, the claimant pays a filing fee, and costs are normally shared equally during the life of the proceeding. Fees and costs may then be apportioned by the arbitrator in the award.[14] The AAA's experience indicates that arbitrators reallocate the costs of arbitration in a majority of the commercial cases that proceed to award. A claimant with a meritorious claim thus has a statistically significant likelihood of recovering at least a portion of any costs he or she is required to advance under the Commercial Arbitration Rules.

The absence in the arbitration clause of any provision for waiver of fees and costs on the basis of hardship is also a fair reason for concern. The AAA, for example, has administrative procedures that allow deferrals or reductions in the AAA's administrative fees where extreme hardship on the part of a party makes paying or advancing some or all of such fees inappropriate. The AAA receives one or two requests each week for a waiver or deferral of administrative fees on the basis of economic hardship. When the hardship is substantiated, these requests are liberally granted.

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[13] A filing fee of $150 is required to file a case in federal court. *See* 28 U.S.C. § 1914(a) (2000).

[14] Rule R-45(c) of the AAA's Commercial Arbitration Rules permits the arbitrator to assess in the award (that is, to allocate among the parties) filing and other administrative fees, expenses, and the arbitrator's compensation "in such amounts as the arbitrator determines is appropriate." Those rules are available as part of the AAA's Commercial Dispute Resolution Procedures on the AAA's website, www.adr.org.

III. THE ELEVENTH CIRCUIT SHOULD HAVE TREATED THE SILENCE OF THE ARBITRATION CLAUSE ON COSTS AS AN AMBIGUITY TO BE CONSTRUED SO AS TO PRESERVE THE ENFORCEABILITY OF THE AGREEMENT TO ARBITRATE

While the Eleventh Circuit's concern about the silence of the arbitration clause regarding the allocation of costs was well founded, its refusal to enforce the arbitration agreement on that basis was not. Section 2 of the Federal Arbitration Act requires that an arbitration agreement be enforced, absent such grounds "as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. No such grounds were found here. Rather, the Eleventh Circuit refused to enforce the arbitration agreement because that clause lacked any provision for shifting the cost of arbitration from the consumer to the business party. Without such a provision, the Eleventh Circuit felt, enforcement of the arbitration clause pursuant to the Federal Arbitration Act would be inconsistent with the purposes underlying the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (2000) ("TILA"), and the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (2000) ("Equal Credit Act"). (Pet. App. 18a.)

TILA gives consumers a remedy "designed to compensate borrowers for injuries caused by misleading disclosures and to deter lenders from making misleading disclosures." *Williams v. Public Fin. Corp.*, 598 F.2d 349, 355 (5th Cir. 1979). The "broad remedial provision" of the Equal Credit Act is intended to ensure "that creditors not affirmatively benefit from proscribed acts of credit discrimination." *See Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 33 (3d Cir. 1995). Recognizing that the actual out-of-pocket losses likely to be suffered would generally be too small to justify the bringing of a civil action, TILA permits an aggrieved consumer to recover

civil penalties, attorneys fees, and court costs. *See* 15 U.S.C. § 1640(a). The Equal Credit Act similarly allows an aggrieved credit applicant to recover punitive damages, attorney fees, and court costs in addition to actual damages. *See* 15 U.S.C. § 1691e. But nothing in the text or history of either act cited by either party in seeking or opposing the grant of a writ of *certiorari* demonstrates an intent on the part of Congress to restrict the availability of those remedies to cases filed in court.[15]

The Eleventh Circuit correctly looked to the purposes of TILA and the Equal Credit Act in considering the effect of the arbitration clause before it. But it neglected in doing so to construe that provision in a manner that would preserve the validity and enforceability of the agreement to arbitrate. As this Court has made clear:

> "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration * * *. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25.

Accord Mitsubishi Motors, 473 U.S. at 626 (same). When construing an agreement to arbitrate, "the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors*, 473 U.S. at 626; *accord Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

There is nothing inherent in the nature of arbitration that would prevent a litigant under TILA or the Equal Credit Act

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[15] The AAA's Consumer Arbitration Rules provide that "The arbitrator may grant any remedy or relief that the parties could have received in court." (Rule 13, App. B, *infra*, 20a.)

from effectively "vindicat[ing his or her] statutory cause of action in the arbitral forum." *See Mitsubishi Motors,* 473 U.S. at 637; *Gilmer,* 500 U.S. at 28. As the Court suggested in *Rodriguez de Quijas*, general attacks on the adequacy of arbitration procedures that rest on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." 490 U.S. at 481; *accord Gilmer,* 500 U.S. at 25. An agreement to arbitrate a statutory claim should thus be enforced unless something specific in its terms would prevent a party from effectively vindicating his or her rights under that statute.

The District of Columbia Circuit resolved a similar concern in favor of arbitration in the context of an agreement to arbitrate claims under Title VII of the Civil Rights Act. *Cole v. Burns Int'l Sec. Servs.,* 105 F.3d 1465 (D.C. Cir. 1997). In that case, as in this one, it was "unclear * * * whether an arbitrator's fees (as distinguished from 'administrative fees') are to be paid by the employee alone, the employer alone, or by the parties together." *Id.* at 1481. The court found that, under Title VII, "employees cannot be *required* to pay for the services of a 'judge' in order to pursue their statutory rights." *Id.* at 1468 (emphasis in original). Faced with this proscription of the statute under which the claim was made, and the ambiguity created by the silence of the arbitration clause on the subject of paying for the fees of the arbitrator, the District of Columbia Circuit decided to "interpret the arbitration agreement * * * as requiring [the employer] to pay all arbitrators' fees," and enforced the arbitration agreement as so interpreted. *Id.* at 1486; *accord McWilliams v. Logicon, Inc.*, 1997 U.S. Dist. LEXIS 9822, at *5 (D. Kan. June 3, 1997) (finding the D.C. Circuit's "opinion in *Cole* both instructive and persuasive" and "adopt[ing] its fee allocation analysis in full").

The same option was open to the Eleventh Circuit. Rather than construing the arbitration clause's silence on fees and costs to conflict with the remedial and deterrent purposes of TILA and the Equal Credit Act, the Eleventh Circuit should have treated the silence as an ambiguity. Consistent with the national policy favoring arbitration and the principle that a construction that would make an agreement unlawful should be avoided when possible, the Eleventh Circuit should have resolved that ambiguity in a manner that would have enabled Respondent to vindicate her statutory rights in the agreed forum.[16] *See, e.g., Cole,* 105 F.3d at 1485 ("where a contract is unclear on a point, an interpretation that makes the contract lawful is preferred to one that renders it unlawful"); *Paladino v. Arnet Computer Technologies, Inc.,* 134 F.3d 1054, 1058 (11th Cir. 1998); Restatement (Second) of Contracts § 203(a) (1981). Those rights would be vindicated by a construction of the arbitration agreement that would shift enough of the burden of paying arbitral fees and costs to Petitioner to assure that Respondent's "ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." (Pet. App. 18a.)[17] Alternatively, to the extent the Eleventh Circuit was concerned that an arbitrator might issue an order imposing costs on Respondent that would be "prohibitive" in relation to the sum at issue (Pet. App. 18a), it could have directed the district court to condition its order compelling arbitration on Petitioner's agreement to bear such costs.

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[16] Normal rules of construction also permit a court to construe ambiguous language against the interest of the party that drafted it. *See Mastrobuono,* 514 U.S. at 64 (construing ambiguous provision in arbitration agreement relating to authority of arbitrator to award punitive damages against the drafter); Restatement (Second) of Contracts § 206 (1981).

[17] Where the bargain of the parties is "sufficiently defined to be a contract," but omits "a term which is essential to a determination of their rights and duties," a court has the authority to supply "a term which is reasonable in the circumstances." Restatement (Second) of Contracts § 204 (1981).

In urging this result, the AAA does not want to suggest that the Court should encourage the lower courts to rewrite arbitration clauses. Such clauses are contracts, and the Federal Arbitration Act is emphatic that they are to be refused enforcement only on grounds applicable to contracts in general. *See* 9 U.S.C. § 2. But when an ambiguity (including an omission) in an agreement to arbitrate is susceptible to one interpretation that will bring it into conflict with the statute under which a claim is brought, and to another interpretation that will reconcile the purpose of that statute with the mandate of the Federal Arbitration Act, established principles of contract law counsel a court to construe the agreement so as to make its enforcement lawful. That is the result that *amicus curiae* AAA urges the Court to reach here.

CONCLUSION

WHEREFORE, *amicus curiae* AAA respectfully urges the Court to reverse the decision of the Court below on the second question presented.

Respectfully submitted,

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APPENDICES

APPENDIX A

CONSUMER DUE PROCESS PROTOCOL

Statement of Principles of the National Consumer Disputes Advisory Committee

PRINCIPLE 1. FUNDAMENTALLY-FAIR PROCESS

All parties are entitled to a fundamentally-fair ADR process. As embodiments of fundamental fairness, these Principles should be observed in structuring ADR Programs.

PRINCIPLE 2. ACCESS TO INFORMATION REGARDING ADR PROGRAM

Providers of goods or services should undertake reasonable measures to provide Consumers with full and accurate information regarding Consumer ADR Programs. At the time the Consumer contracts for goods or services, such measures should include (1) clear and adequate notice regarding the ADR provisions, including a statement indicating whether participation in the ADR Program is mandatory or optional, and (2) reasonable means by which Consumers may obtain additional information regarding the ADR Program. After a dispute arises, Consumers should have access to all information necessary for effective participation in ADR.

PRINCIPLE 3. INDEPENDENT AND IMPARTIAL NEUTRAL; INDEPENDENT ADMINISTRATION

1. ***Independent and Impartial Neutral.*** *All parties are entitled to a Neutral who is independent and impartial.*

2. ***Independent Administration.*** *If participation in mediation or arbitration is mandatory, the procedure should be administered by an Independent ADR Institution. Administrative services should include the maintenance of a panel of pro-*

spective Neutrals, facilitation of Neutral selection, collection and distribution of Neutral's fees and expenses, oversight and implementation of ADR rules and procedures, and monitoring of Neutral qualifications, performance, and adherence to pertinent rules, procedures and ethical standards.

3. ***Standards for Neutrals.*** *The Independent ADR Institution should make reasonable efforts to ensure that Neutrals understand and conform to pertinent ADR rules, procedures and ethical standards.*

4. ***Selection of Neutrals.*** *The Consumer and Provider should have an equal voice in the selection of Neutrals in connection with a specific dispute.*

5. ***Disclosure and Disqualification.*** *Beginning at the time of appointment, Neutrals should be required to disclose to the Independent ADR Institution any circumstance likely to affect impartiality, including any bias or financial or personal interest which might affect the result of the ADR proceeding, or any past or present relationship or experience with the parties or their representatives, including past ADR experiences. The Independent ADR Institution should communicate any such information to the parties and other Neutrals, if any. Upon objection of a party to continued service of the Neutral, the Independent ADR Institution should determine whether the Neutral should be disqualified and should inform the parties of its decision. The disclosure obligation of the Neutral and procedure for disqualification should continue throughout the period of appointment.*

PRINCIPLE 4. QUALITY AND COMPETENCE OF NEUTRALS

All parties are entitled to competent, qualified Neutrals. Independent ADR Institutions are responsible for establishing and

maintaining standards for Neutrals in ADR Programs they administer.

PRINCIPLE 5. SMALL CLAIMS

Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction.

PRINCIPLE 6. REASONABLE COST

1. ***Reasonable Cost.*** *Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay. In some cases, this may require the Provider to subsidize the process.*
2. ***Handling of Payment.*** *In the interest of ensuring fair and independent Neutrals, the making of fee arrangements and the payment of fees should be administered on a rational, equitable and consistent basis by the Independent ADR Institution.*

PRINCIPLE 7. REASONABLY CONVENIENT LOCATION

In the case of face-to-face proceedings, the proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances. If the parties are unable to agree on a location, the determination should be made by the Independent ADR Institution or by the Neutral.

PRINCIPLE 8. REASONABLE TIME LIMITS

ADR proceedings should occur within a reasonable time, without undue delay. The rules governing ADR should establish specific reasonable time periods for each step in the ADR proc-

ess and, where necessary, set forth default procedures in the event a party fails to participate in the process after reasonable notice.

PRINCIPLE 9. RIGHT TO REPRESENTATION

All parties participating in processes in ADR Programs have the right, at their own expense, to be represented by a spokesperson of their own choosing. The ADR rules and procedures should so specify.

PRINCIPLE 10. MEDIATION

The use of mediation is strongly encouraged as an informal means of assisting parties in resolving their own disputes.

PRINCIPLE 11. AGREEMENTS TO ARBITRATE

Consumers should be given:

(a) *clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character;*

(b) *reasonable access to information regarding the arbitration process, including basic distinctions between arbitration and court proceedings, related costs, and advice as to where they may obtain more complete information regarding arbitration procedures and arbitrator rosters;*

(c) *notice of the option to make use of applicable small claims court procedures as an alternative to binding arbitration in appropriate cases; and,*

(d) *a clear statement of the means by which the Consumer may exercise the option (if any) to submit disputes to arbitration or to court process.*

PRINCIPLE 12. ARBITRATION HEARINGS

1. ***Fundamentally-Fair Hearing.*** *All parties are entitled to a fundamentally-fair arbitration hearing. This requires adequate notice of hearings and an opportunity to be heard and to present relevant evidence to impartial decision-makers. In some cases, such as some small claims, the requirement of fundamental fairness may be met by hearings conducted by electronic or telephonic means or by a submission of documents. However, the Neutral should have discretionary authority to require a face-to-face hearing upon the request of a party.*

2. ***Confidentiality in Arbitration.*** *Consistent with general expectations of privacy in arbitration hearings, the arbitrator should make reasonable efforts to maintain the privacy of the hearing to the extent permitted by applicable law. The arbitrator should also carefully consider claims of privilege and confidentiality when addressing evidentiary issues.*

PRINCIPLE 13. ACCESS TO INFORMATION

No party should ever be denied the right to a fundamentally-fair process due to an inability to obtain information material to a dispute. Consumer ADR agreements which provide for binding arbitration should establish procedures for arbitrator-supervised exchange of information prior to arbitration, bearing in mind the expedited nature of arbitration.

PRINCIPLE 14. ARBITRAL REMEDIES

The arbitrator should be empowered to grant whatever relief would be available in court under law or in equity.

PRINCIPLE 15. ARBITRATION AWARDS

1. ***Final and Binding Award; Limited Scope of Review.*** *If provided in the agreement to arbitrate, the arbitrator's award should be final and binding, but subject to review in*

accordance with applicable statutes governing arbitration awards.

2. ***Standards to Guide Arbitrator Decision-Making.*** *In making the award, the arbitrator should apply any identified, pertinent contract terms, statutes and legal precedents.*

3. ***Explanation of Award.*** *At the timely request of either party, the arbitrator should provide a brief written explanation of the basis for the award. To facilitate such requests, the arbitrator should discuss the matter with the parties prior to the arbitration hearing.*

INTRODUCTION: GENESIS OF THE ADVISORY COMMITTEE

Recent years have seen a pronounced trend toward incorporation of out-of-court conflict resolution processes in standardized agreements presented to consumers of goods and services. Some of these processes (such as mediation and non-binding evaluation) involve third party intervention in settlement negotiations; others involve adjudication (binding arbitration). Such processes have the potential to be of significant value in making dispute resolution quicker, less costly, and more satisfying.[1]

Yet because consumer contracts often do not involve arm's length negotiation of terms, and frequently consist of boilerplate language presented on a take-it-or-leave it basis by suppliers of goods or services, there are legitimate concerns regarding the fairness of consumer conflict resolution mechanisms required by suppliers. This is particularly true in the realm of binding arbi-

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[1] *See, e.g.*, CPR Institute for Dispute Resolution, *ADR Cost Savings & Benefit Studies* (Catherine Cronin-Harris, ed. 1994)(summarizing some of the research findings on the relative advantages ADR may offer). *See also, e.g., Madden v. Kaiser Foundation Hosp.*, 17 Cal. 3d 699, 711, 552 P.2d 1178, 1186 (1976)("The speed and economy of arbitration, in contrast to the expense and delay of a jury trial, could prove helpful to all parties . . . ")

tration, where the courts are displaced by private adjudication systems. In such cases, consumers are often unaware of their procedural rights and obligations until the realities of out-of-court arbitration are revealed to them after disputes have arisen.[2] While the results may be entirely satisfactory, they may also fall short of consumers' reasonable expectations of fairness[3] and have a significant impact on consumers' substantive rights and remedies.[4]

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[2] The arbitration agreement may be included in the "fine print" in a brochure of terms and conditions inside a box of goods. *See, e.g., Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997)(customers agreed to computer company's contract terms, including arbitration agreement, by failing to return merchandise within 30 days). *See also* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV.33, 40-53 (offering a "cautionary tale" regarding employment arbitration agreement).

[3] *See* Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J.ON DISP. RES. 267 (1995)(discussing procedural limitations of arbitration in treating consumer disputes with banks and lenders); Schwartz, *supra* note 2 (discussing issues relating to adhesion contracts involving employees and consumers); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TULANE L. REV.1 (1997)(discussing due process concerns with binding arbitration under employment and consumer contracts). *See, e.g., Engalla v. Permanente Med. Grp.*, 938 P.2d 903 (Cal. 1997)(medical group may not compel arbitration where it administers own arbitration program, fraudulently misrepresents speed of arbitrator selection process, and then forces delays); *Broemmer v. Abortion Serv. of Phoenix*, 840 P.2d 1013 (Az. 1992)(refusing to enforce agreement in "adhesion contract" where drafter inserted potentially self-serving term requiring sole arbitrator of medical malpractice claims to be a licensed medical doctor).

[4] *See* Schwartz, *supra* note 2, at 60-61 (discussing perceptions regarding relative damages awards in court and in arbitration), 64-66 (summarizing some statistics on arbitration awards). *See also* William W. Park, *When and Why Arbitration Matters*, in THE COMMERCIAL WAY TO JUSTICE 73, 75

The use of mediation and other forms of alternative dispute resolution (ADR) by various state and federal courts has also raised concerns regarding quality, effectiveness and fairness. The response has been a number of national, state and local initiatives to establish standards for the guidance and information of courts. Until now, however, there has been no comparable national effort in the private consumer sphere.

In the spring of 1997, the American Arbitration Association (AAA) announced the establishment of a National Consumer Disputes Advisory Committee. The stated mission of the Advisory Committee is:

> *To bring together a broad, diverse, representative national advisory committee to advise the American Arbitration Association in the development of standards and procedures for the equitable resolution of consumer disputes.*

In light of its stated mission, the Advisory Committee's recommendations are likely to have a direct impact on the development of rules, procedures and policies for the resolution of consumer disputes under the auspices of the AAA.

The Advisory Committee's recommendations may also have a significant impact in the broader realm of consumer ADR. A Statement of Principles which is perceived as a broadly-based consensus regarding minimum requirements for mediation and arbitration programs for consumers of goods and services may influence the evolution of consumer rules generally and the development of state and federal laws governing consumer arbitration agreements. The standards may affect the drafting of statutes and influence judicial opinions addressing

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(G.M. Beresford Hartwell ed., 1997)("*Who* interprets an . . . agreement will frequently be more significant than *what* the applicable law says about the agreement . . .").

the enforceability of arbitration agreements pursuant to existing state or federal law.[5]

[Pages 9-46 of the Consumer Due Process Protocol, containing a detailed discussion of each principle, have been omitted from this Appendix but may be found on the AAA's website at www.adr.org]

A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES

SIGNATORIES

Dated: April 17, 1998

Some of the signatories to this Protocol were designated by their respective organizations, but the Protocol reflects their personal views and should not be construed as representing the policy of the designating organizations.

The Honorable Winslow Christian
Co-chair
Justice (Retired)
California Court of Appeal

William N. Miller
Co-chair
Director of the ADR Unit
Office of Consumer Affairs
Virginia Division of Consumer Protection
Designated by National Association of Consumer Agency Administrators

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[5] *See, e.g., Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997)(citing Due Process Protocol for Employment Disputes). The consensus-based approach of this broadly constituted group reflects the "public interest" model espoused by Professor Speidel. *See* Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335 (1996)

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Daniel C. Smith
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APPENDIX B

ARBITRATION RULES FOR THE RESOLUTION OF CONSUMER-RELATED DISPUTES

INTRODUCTION

Millions of consumer transactions take place each year. Occasionally there are disagreements between consumers and businesses. These disagreements can be resolved by arbitration promptly and economically.

About the AAA

The American Arbitration Association (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, and government. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.

The AAA's Consumer ADR Rules

The AAA developed *Arbitration Rules for the Resolution of Consumer-Related Disputes* for consumers and businesses who want to have their disagreements resolved by arbitrators, and avoid the costs and delays of litigation. Services are available through the Association's Dallas Case Management Center.

To use the Rules, a request for arbitration must be (1) filed by the consumer and (2) involve a claim under $10,000.

Mediation

Mediation is also available to assist parties to resolve their disputes. If the parties want to use mediation, they may do so under the Association's Commercial Mediation Rules.

Administrative Fees

The Association charges a fee for the administration of a consumer arbitration under these rules. To begin the process, consumers must accompany their request for arbitration with $125 as their portion of the arbitrator's fee. The AAA will send notice to the business that the AAA has received a consumer case under these rules. An administrative fee of $500 is then due from the business, together with $125 as their portion of the arbitrator's fee.

GLOSSARY OF TERMS

Consumer

Consumer refers to an individual who purchases or leases goods or services, or contracts to purchase or lease goods or services, intended primarily for personal, family or household use.

Business

Business refers to a seller or lessor of goods or services to consumers for personal, family or household use.

ADR Process

An ADR (Alternative Dispute Resolution) Process is a method for out-of-court resolution of conflict through the intervention of third parties. Mediation and arbitration are the most widely used ADR processes.

Mediation

Mediation refers to a process in which an impartial person helps parties to a dispute to communicate and to make voluntary, informed choices in an effort to resolve their dispute. A mediator, unlike an arbitrator, does not issue a decision regarding the merits of the dispute, but instead

facilitates communication between the parties to help them arrive at a mutually agreeable settlement.

Desk Arbitration

Arbitration is a process in which parties submit disputes to a neutral third person for a decision on the merits. Each party has an opportunity to present evidence to the arbitrator in writing. Arbitrators are not required to follow the Rules of Evidence used in court. Arbitrators decide cases by written decisions or "awards." An award is usually binding on the parties, depending on the agreement to arbitrate. If necessary, a "binding" arbitration award may be enforced as a court judgment, but judicial review of arbitration awards is limited.

Neutral

A Neutral is a mediator, arbitrator, or other independent, impartial third person selected to serve in a dispute.

ADR Agreement

An ADR Agreement is an agreement between a business and a consumer to submit disputes to mediation, arbitration, or other ADR Processes. As used in this statement, the term includes provisions in standard contracts furnished by providers which signify the assent of the consumer and provider to such processes (although the assent may only be the "generalized assent" typically given by consumers to standard terms).

ADR Program

An ADR Program is any program or service established by or used by a provider of goods and services for out-of-court resolution of disputes.

Independent ADR Institution

An Independent ADR Institution is an organization that provides independent and impartial administration of ADR programs for consumers and businesses.

ARBITRATION RULES FOR THE RESOLUTION OF CONSUMER-RELATED DISPUTES

1. Agreement of Parties and Applicability

Parties have agreed to arbitration by the American Arbitration Association (AAA) under these rules whenever the AAA or its rules are referred to in an agreement between a consumer and a business. The AAA will apply the rules that are in effect at the time the request is filed. The authority and duties of the AAA are defined by the parties in their agreement and in these rules.

These procedures will only apply in cases where the claim is under $10,000, exclusive of interest, arbitration fees, and costs. These rules may not be used where there is no stated claim. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction.

2. Initiation Under an Arbitration Agreement

Where an agreement to arbitrate exists, arbitration may be initiated as follows:

(a) The consumer must notify the business, in writing, that it wants to arbitrate a dispute. This notification is referred to as the "request" for arbitration. The request should:

- briefly explain the dispute,
- list the names and addresses of the consumer and the business,
- specify the amount of money involved and,
- indicate the solution sought.

The consumer must also send two copies of the request to the AAA, at the time it sends the request to the business. When sending the request to the AAA, the consumer must attach a copy of the arbitration agreement together with $125 for its share of the arbitrator's compensation.

(b) The business may answer the consumer's request. The answer must be sent to the AAA within 10 calendar days after the AAA acknowledges receipt of claimant's request. The answer must also:

- be in writing,
- be sent, in duplicate, to the AAA,
- be simultaneously sent to the consumer.

If an answer is not sent on time, it will be assumed that the business disagrees with the consumer's claim. The arbitration will go forward, even if the business does not file an answer.

3. Initiation Under a Submission

Where no agreement to arbitrate exists, the consumer and the business may agree to arbitrate an existing dispute. To begin an arbitration under these rules, the parties must jointly send the AAA a submission agreement. The submission agreement must:

- be in writing,
- briefly explain the dispute,
- list the names and addresses of the consumer and the business,
- specify the amount of money involved (if any), and,
- indicate the solution sought.

The parties should send two copies of the submission to the AAA. When sending the submissions to the AAA, the consumer must include $125 for its share of the arbitrator's compensation and the business must include $500 for the

administrative fee, in addition to $125 for its share of the arbitrator's compensation.

4. The Arbitrator

(a) Appointment

When the AAA receives the request or submission, the AAA will appoint an arbitrator to serve. The parties will have seven calendar days from the time the AAA notifies them of the arbitrator to submit any factual objections to that person.

(b) Disclosure and Challenge Procedure

(i) The arbitrator must disclose to the AAA any circumstance that is likely to affect his or her impartiality. This includes any bias, any financial or personal interest in the result of the arbitration, or any past or present relationship with the parties or their representatives. If the AAA receives disclosed information, it will share the information with the parties and ask for their comments.

(ii) If either party objects to the arbitrator continuing to serve on the case, the AAA will decide whether to remove the arbitrator. The AAA will inform the parties of its decision.

5. Proceedings on Documents

Disputes under these rules are resolved by reviewing documents submitted by the parties. Documents must be sent to the AAA for forwarding to the arbitrator.

6. Optional Hearing by Telephone

A party may request in writing that the arbitrator hold one hearing by telephone. The telephonic hearing may occur even if the other party refuses to participate. An additional $100

must accompany a request for a telephonic hearing. If a party wants to have an in-person hearing, instead of a telephonic hearing, the dispute must be administered under the AAA's Commercial Arbitration Rules. The party who requests an in-person hearing must pay all the administrative fees, expenses, and compensation costs in the Commercial Arbitration Rules.

7. Representation

Parties may be represented by counsel, if they choose.

8. Evidence

(a) The parties may offer evidence about the dispute. The arbitrator has the authority to determine which evidence is relevant and material. Parties are expected to produce whatever evidence is requested by the arbitrator. The parties do not have to follow legal rules of evidence.

(b) An arbitrator, or other person authorized by law to subpoena documents, may do so upon the request of any party or independently.

9. Closing of Hearing

(a) The hearing will be closed on the date the AAA sends the final documents to the arbitrator.

(b) The arbitrator may reopen the hearing to accept additional evidence at any time before the award is written and signed.

10. Waiver of Rules

A party's right to object will be considered waived if the party proceeds with the arbitration knowing that the other party has not followed a provision or requirement of these rules, and fails to timely object in writing.

11. Extensions of Time

The AAA or the arbitrator may give each party one seven-day extension of any deadline in these rules.

12. Serving of Documents

(a) The AAA may notify the parties by telephone. The AAA, the arbitrator, and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules. Notices may be transmitted by electronic mail (E-mail), where all parties and the arbitrator agree.

(b) All documents pertaining to the arbitration, or related court action, or the entry of judgment on any award, may be served on a party by mail addressed to the party, or its representative, at its last known address. Notices may also be made by personal service, in or outside the state where the arbitration is to be administered, provided that reasonable opportunity to be heard with regard to the dispute has been given to the party.

(c) When sending documents to the AAA, a party must also send copies to the other party at the same time.

13. The Award

(a) unless the parties agree otherwise, the arbitrator must make his or her award within 14 calendar days after the AAA transmits the final statements and proofs to the arbitrator.

(b) Awards shall be in writing and shall be executed as required by law.

(c) In the award, the arbitrator should apply any identified, pertinent contract terms, statutes, and

legal precedents. The arbitrator may grant any remedy or relief that the parties could have received in court. The award shall be final and binding, but subject to review in accordance with applicable statutes governing arbitration awards.

14. Release of Documents for Judicial Proceedings

Upon the written request of a party, the AAA will send the party certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration. The requesting party will be charged the cost of this service.

15. Applications to Court and Exclusion of Liability

(a) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.

(b) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(c) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

16. Arbitrator's Compensation

Arbitrators serving under these rules receive a fee of $250, paid equally by the parties, for considering the parties' evidence and writing an award.

17. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules as they relate to the arbitrator's powers and duties. All other procedures shall be interpreted and applied by the AAA.

ADMINISTRATIVE FEES

When filing a request for arbitration, the consumer must include $125 for its share of the arbitrator's compensation. When the AAA acknowledges notice of the request for arbitration, it will bill the business for the $500 administrative fee, and $125 for its share of the arbitrator's compensation.

If the business fails to pay its fees and share of arbitrator compensation, the consumer may advance such funds, which shall subsequently be allocated to the business in the arbitrator's award.

Any party requesting a telephonic hearing must remit an additional $100.

All fees are non-refundable.